



**MWM v Republic (Criminal Appeal 68 of 2019)  
[2023] KEHC 3331 (KLR) (11 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3331 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL 68 OF 2019  
SM MOHOCHI, J  
APRIL 11, 2023**

**BETWEEN**

**MWM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal against the sentence in CM'Court Cr No. 128 of 2028 - Eldoret,  
Republic v MWM, delivered by D. MILIMU, R.M. delivered on 26.04.2019.)*

**JUDGMENT**

**Introduction**

1. The appellant was charged, tried, convicted on the 26<sup>th</sup> April 2019 for the offence of defilement contrary to Section 8(1) as read together with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The Appellant was accordingly Sentenced to serve life imprisonment having been found guilty of defiling a 9-year-old girl and a close relation with the victim here being a daughter to the appellant's brother, in other words the appellant is an uncle to the victim.
3. Being dissatisfied and aggrieved of the conviction and sentence the appellant filed his appeal on the 8<sup>th</sup> May 2019 during the service week and this court sadly notes that his appeal was eventually heard on the 19<sup>th</sup> January 2023 almost three (3) years later owing to institutional exigencies.
4. It is noteworthy that the appeal has evolved and mutated since filing of the original petition of appeal to the amended grounds of appeal under Section 350(2) dated 12<sup>th</sup> January 2023 where he abandoned his quest to challenge and contest his conviction and concentrated his appeal on the sentencing which I shall describe for clarity in this judgement.
5. Notwithstanding the failure to seek leave to amend by the applicant, this court invokes its inherent powers to admit his amended grounds and consider them as the basis of this appeal.



6. The appellant has challenged his sentence on the following five (5) grounds: -
  - a. That, he is remorseful person.
  - b. That, he is I am first offender.
  - c. That, he has a family and other family members who depends on me.
  - d. That, the minimum and maximum mandatory sentences under sexual offence Act no 3 of 2006 was declared unconstitutional in petition no E17 of 2021 Machakos and petition no 97 at Mombasa.
  - e. That, that he prays that his mitigation be considered.
7. The court observes that the grounds as formulated would constitute mitigation, urging that the life term imprisonment sentence, was declared unconstitutional by two high courts, hence his appeal.
8. The Appeal is opposed on three main grounds namely: -
  - a. That the prosecution’s case was proved beyond reasonable doubt.
  - b. The appellants defence was duly considered; and
  - c. The sentence was legal.
9. It is the duty of this first appellate court for an exhaustive examination of the trial court proceedings in criminal cases as was restated in the case of *Charles Mwita -vs- Republic*, C. A. Criminal Appeal No. 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that;
 

“In *Okeno v R* [1972] E.A. 32 at page 36 the predecessor of this Court stated: - “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya -v- R* [1957] EA. 336) and to the appellate court’s own decision on the evidence”.
10. Being a 1st Appeal Court, I must, weigh conflicting evidence and draw conclusions, (*Shantilal M. Ruwalla -v- R* [1957]EA 570) it is not the function of a 1st Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own findings and draw its own conclusions Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E.A. 424.”
11. Sentencing is a discretion of the trial court. In *Bernard Kimani Gacheru -Vs- Republic* (2002) eKLR, the Court of Appeal stated that:-
 

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not



sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist”.

12. The Appellant has however opted to argue that the sentence in itself was unconstitutional as declared by two decisions by this court in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) High Court at Machakos and *Edwin Wachira & 13 Ors Vs Republic* (petition no. 97 of 2021) High Court at Mombasa.
13. It is my respective view that the validity of the sentence was not impugned by the two decisions cited above, in fact just to quote Odunga. J (as he then was) in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) High Court at Machakos: -

“My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the Courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under article 28 of the Constitution. In other words, since the provisions of the *Sexual Offences Act* came into force earlier than *the Constitution*, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not consider the dignity of the individuals as mandated under Article 28 of *the Constitution* as appreciated in the Muruatetu 1 Case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional”.
14. The Blanket assertion in submission, by the appellant that the provision(s) in which he was sentenced were declared unconstitutional and he should thus benefit is not correct and what the court found is that, where the discretion is fettered in sentencing then the court can interfere on resentencing.
15. The Scrutiny of the trial court proceedings reveals that the appellant was invited to mitigate, of which he stated: -

“I am very sick, my children are not going to school, I want the court to look at the time I have spent in custody”.
16. On the same note the court took into consideration the appellant’s mitigation before imposing the sentence, however the trial court notes its fettered discretion “the offence carries a minimum sentence” before imposing the sentence. The court equally does not take into consideration of the time the appellant has remained in pre-trial custody as he had mitigated.
17. The purpose and objectives of sentencing as stated in the Judiciary Sentencing Policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to.
18. The Court recalls the seriousness of the crime committed by the appellant upon a nine-year-old toddler, the far-reaching life-time consequences, the need for future specialized treatment and the uncontested and cemented conviction.
19. On the same note, this court considers as irrelevant all grounds of mitigation that are secondary to those made in the trial court. Mitigating factors cannot be allowed to mutate with time. Therefore, the valid mitigation remains those that formed basis during sentencing in the trial court.



20. Having considered the Mitigation on record, I hereby set aside the Life Sentence imposed on the appellant and substitute the same to an imprisonment term of thirty (30) years.
21. The Imprisonment term shall run from the 18<sup>th</sup> June 2018 to include the pre-trial detention period.

It is so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON**

**THIS 11<sup>TH</sup> APRIL 2023**

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**MOHOCHI S.M**

**JUDGE**

**11. 04.2023**

In the Presence of;

Appellant in Person

Mr. Mugun for the Republic

Mr. Kenei C.A

